UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

EUGENE B. BOWLER,	)	
	)	
Plaintiff	)	
	)	
v.	)	**Civil No. 00-39-B**
	)	
STATE OF MAINE,	)	
	)	
Defendant	)	

GENE CARTER, District Judge

MEMORANDUM OF DECISION AND ORDER

Before the Court is Defendant's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(6) (Docket # 4). For the reasons discussed below, the Court will grant the Motion.

Plaintiff, Eugene Bowler, appearing pro se, has filed this case against the State of Maine. Mr. Bowler argues that the State has violated his rights under the First, Fifth, Sixth, Ninth, and Tenth Amendments. These violations allegedly began on February 10, 2000, when Dr. Boogusch, a physician who had previously treated Mr. Bowler, obtained a temporary order for protection ("TOP") against him. Pursuant to the TOP, Mr. Bowler was prohibited from having any contact with Dr. Boogusch and from "repeatedly and without reasonable cause . . . being at or in the vicinity of [the doctor's] home, school, business or place of employment." Temp. Order for Protection (Rockland Dist. Ct. No.

ROC-SA-00-48) (dated Feb. 10, 2000).[1] In addition to these written prohibitions, Mr. Bowler claims that the Camden Police Officer who served him with the TOP simply told him to "stay off" Dr. Boogusch's street. *Am. Compl.* ¶ 3 (Docket #3).

The Rockland District Court issued the challenged TOP under Maine's Protection from Harassment Statute, 5 M.R.S.A. § 4651 *et seq*. Pursuant to the statute, Dr. Boogusch filed a sworn petition in which she certified that she was "in immediate and present danger." *See* 5 M.R.S.A. § 4654. Her complaint explained that although Dr. Boogusch dismissed Mr. Bowler from her practice, Mr. Bowler had sent her numerous gifts and letters, repeatedly left telephone messages on her answering machine, and was frequently seen walking around the doctor's home and driveway. Based on this intimidating behavior, the Court granted Dr. Boogusch a TOP restraining Mr. Bowler.[2]

Under Maine's statute, any person subject to a TOP may move for its dissolution or modification at a court hearing on two days notice to the person who sought the TOP.

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[1] In this case, both parties have attached exhibits to their various pleadings. Specifically, the Plaintiff filed his original Complaint with (1) the Summons Protection Order, (2) the Temporary Order for Protection and Notice of Hearing, and (3) the Complaint for Protection from Harassment filed by Dr. Boogusch. *See Compl*. (Docket #1). Defendant then attached to its Motion to Dismiss (1) the Order of Continuance (Def. Ex. A) and (2) Agreement re: Plaintiff's Complaint For Protection from Harassment (filed with the Rockland District Court on March 16, 2000) (Def. Ex. B). *See* Def.'s Mot. to Dismiss (Docket #4). The Court has found these materials helpful in deciphering Plaintiff's pro se complaint. While ordinarily the Court's consideration of such documents would require the Court to convert a motion under Rule 12(b)(6) to a motion for summary judgment, in this case the documents fit within a narrow exception. Namely, all of the documents listed above are "official public records . . .central to plaintiff's claim" and their authenticity is not disputed. *See Watterson v. Page*, 987 F.2d 1, 3-4 (1st Cir. 1993). Therefore, the Court may consider these documents without converting Defendant's Motion to Dismiss to a motion for summary judgment. *See id*. at 4.

[2] Under the TOP, the court ordered that:

1. Mr. Bowler is prohibited from having any contact with Dr. Boogusch directly or indirectly;
2. Mr. Bowler is prohibited from imposing any restriction upon the person or liberty of the plaintiff;
3. Mr. Bowler is prohibited from threatening, assaulting, molesting, harassing, or otherwise disturbing the peace of Dr. Boogusch;
4. Mr. Bowler is prohibited from, repeatedly and without reasonable cause, following Dr. Boogusch or being at or in the vicinity of her home, school, business or place of employment;
5. Mr. Bowler is prohibited from taking, converting or damaging property in which Dr. Boogusch may have a legal interest.

See Temp. Order for Protection (Rockland Dist. Ct. No. ROC-SA-00-48) (dated Feb. 10, 2000).

See 5 M.R.S.A. § 4654(6). If no such request for a hearing is made, the court holds a full hearing within 21 days of the filing of a petition. *See* 5 M.R.S.A. § 4654(1). In this case, Mr. Bowler did not request dissolution or modification of the TOP. In fact, at the scheduled hearing on February 29, 2000, Mr. Bowler agreed to a continuance. *See* Def.'s Ex. A (Docket # 4). Then, before a hearing was ever held, Mr. Bowler entered into informal agreement with Dr. Boogusch. *See* Def.'s Ex. B (Docket # 4). As a result, the TOP expired on March 3, 2000. Nonetheless, Mr. Bowler filed this case against the State of Maine on March 7, 2000, claiming that the TOP in effect from February 10, 2000, through March 3, 2000, violated a long list of his constitutional rights.[3]

The State of Maine argues this case, as it is currently postured, violates the Eleventh Amendment's protection of Maine's sovereign immunity. While Defendant has suggested that this is a jurisdictional issue, the First Circuit has not endorsed this view. *See Parella v. Retirement Bd. of the Rhode Island Employees Retirement Sys.*, 173 F.3d 46, 55-57 (1st Cir. 1999). Rather, the First Circuit has explained that "the relevant maxim in the Eleventh Amendment context is not that federal courts cannot act without first establishing their jurisdiction, but rather that courts should 'not reach constitutional arguments in advance of the necessity of deciding them.'" *Id*. (*citing American Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 62 (1999)).

Thus, the Court considers Defendant's other arguments for dismissal before addressing the issue of sovereign immunity. First, Defendant argues that Mr. Bowler lacks standing. To have standing, Mr. Bowler must prove that (1) he personally suffered

[3] The Court reads Mr. Bowler's complaint and the subsequent amendments (Docket # 1-3) as alleging constitutional violation while the TOP was in effect. To the extent, Mr. Bowler is alleging Defendant continued to violate his constitutional rights after March 3, 2000, such claims are mooted by Mr. Bowler's entering into an informal agreement with Dr. Boogusch.

some actual or threatened injury; (2) the injury can be fairly traced to the TOP; and (3) the injury likely will be addressed by a favorable decision from the court. *See Berner v. Delahanty*, 129 F.3d 20, 24 (1st Cir. 1997) (*citing New Hampshire Right to Life PAC v. Gardner*, 99 F.3d 8, 13(1st Cir. 1996)), *cert. denied* 523 U.S. 1023 (1998). Additionally, because Mr. Bowler seeks only injunctive and declaratory relief, he must show "an invasion of a legally protected interest which is . . . concrete and particularized, together with a sufficient likelihood that he will again be wronged in a similar way." *Id*. (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) and *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)).

The Court notes that the type of relief Mr. Bowler has standing to seek is more limited than his pleadings suggest. Because the TOP lapsed before this suit was filed, Mr. Bowler lacks standing to seek injunctive relief. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 109 (1998) (finding that injunctive relief will not redress an injury where there is no "continuing violation or likelihood of future violation"). Therefore, the Court considers whether Mr. Bowler has standing to seek declaratory relief on his various claims.

Under the three-part test for standing laid out above, many of Mr. Bowler's claims crumble. First, Mr. Bowler has not alleged that he plans to engage in harassing behavior that would once again subject him to a TOP. *See Berner*, 129 F.3d at 24 (finding plaintiff had standing because he vowed to engage in similar behavior again); *Brown v. Hot, Sexy & Safer Prod.*, 68 F.3d 525, 539 (1st Cir. 1995) (explaining that "past exposure to harm will not in and of itself confer standing upon a litigant to obtain equitable

relief"). Thus, the likelihood that Mr. Bowler will be wronged again in a similar way is questionable.

More importantly, Mr. Bowler has failed to show that he has personally suffered an actual or threatened injury to many of the constitutional rights listed in his complaint and amendments thereto. In fact, the prohibitions listed in the TOP focus on preserving Dr. Boogusch's liberty rather than limiting Mr. Bowler's constitutional rights. *See supra note 2*. Specifically, the limits placed on Mr. Bowler in the TOP neither violated any of his rights under the Fifth, Sixth, Ninth or Tenth Amendments, nor did the TOP cause any injury in fact to Mr. Bowler's right to a trial by jury or subject him to warrantless arrest. *See* Wright Miller & Copper, Federal Practice and Procedure 2d §3531.4 at 421 ("It is not enough that the plaintiff can point to a plausible injury to a significant interest.") For this reason, the Court finds that Mr. Bowler lacks standing to bring claims under the Fifth, Sixth, Ninth or Tenth Amendments and the Court declines to address these alleged constitutional violations on the merits.

On the other hand, the Court finds that Mr. Bowler has standing to pursue his claims that Maine's Protection from Harassment Statute is void for vagueness, violated his right to due process, and restricted his rights under the First Amendment. [4] In considering these claims, the Court must accept all of Mr. Bowler's factual averments and indulge every reasonable inference in his favor. *See Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996). Considering the facts in this light, the Court is not prepared to say that

[4] Defendant argues that even if Mr. Bowler has standing to pursue these claims, the claims are moot because Mr. Bowler is no longer subject to the TOP. If Bowler's claim was moot, there is no longer Article III jurisdiction because there is no case or controversy. *See Parella*, 173 F.3d at 57 (*citing SEC v. Medical Comm. for Human Rights*, 404 U.S. 403, 407 (1972)). In this case, Mr. Bowler's challenge to Maine's TOP statute falls within an exception to the mootness doctrine because it is a wrong that is capable of repetition and yet evades review. *See Nollet v. Justices of the Trial Court*, 83 F.Supp.2d 204, 209 n.4 (D. Mass. 2000) (explaining that a similar challenge to a similar Massachusetts statute would fall within the same exception to the mootness doctrine).

Mr. Bowler "cannot recover on any viable theory." *Correa-Martinez v. Arrillaga-Blendez*, 903 F.2d 49, 52 (1st Cir. 1990).

Nonetheless, before reaching these various constitutional arguments, the Court returns to Maine's sovereign immunity as the threshold constitutional question raised in the Defendant's Motion to Dismiss. Quite simply, Plaintiff's case, as it is currently captioned, is barred under the doctrine of sovereign immunity. *See Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974) (explaining that under the Eleventh Amendment "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State"). Although Mr. Bowler may have standing to pursue these constitutional challenges if he were to file an amended complaint that named a state officer as the defendant, Maine's sovereign immunity prevents Mr. Bowler from asserting these claims against the State itself in federal court. *See Ex parte Young*, 209 U.S. 123, 159-60 (1908). *See also Alden v. Maine*, 119 S.Ct. 2240, 2263 (1999) (explaining that allowing certain suits for declaratory and injunctive relief against state officers under the *Ex parte Young* exception is necessary "if the Constitution is to remain the supreme law of the land").

Pursuant to the First Circuit's instruction that judicial restraint allows a Court to avoid "Eleventh Amendment questions where there are other dispositive issues," *Parella*, 173 F.3d at 55, the Court dismisses Plaintiff's claims under the Fifth, Sixth, Ninth and Tenth Amendments because the Plaintiff lacks standing. Plaintiff's remaining claims that the statute in question is void for vagueness and violates his right to due process as well as his rights under the First Amendment are also dismissed because of the Defendant's sovereign immunity.

Accordingly, it is ORDERED that the Motion to Dismiss under Rule 12(b)(2) & (6) by Defendant State of Maine, be, and it is hereby, GRANTED.

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GENE CARTER
District Judge

Dated at Portland, Maine this 18th day of July, 2000.

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